

The claimant requests review and argues that his medical expert's functional impairment rating more accurately reflects claimant's condition and should be adopted. In the alternative, claimant argues that his medical expert's functional impairment rating and the court ordered medical examiner's functional impairment rating should each be given equal weight and averaged.

Respondent requests the Board to affirm the ALJ's Award.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant suffered a work-related injury on October 28, 2004, when he lifted an acetylene bottle and injured his back. Dr. Benjamin Norman diagnosed claimant with a lumbar sprain/strain and provided conservative treatment with physical therapy. A November 3, 2004 MRI revealed mild lower lumbar spondylosis and facet arthropathy with broad based disk bulging at L4-5 and L5-S1.

When conservative treatment measures failed to relieve claimant's symptoms he was referred to Dr. Amitabh Goel for further treatment. Dr. Goel first saw claimant on December 13, 2004, and diagnosed claimant with a low back sprain/strain with lumbar spondylosis and symptomatic facet joint syndrome on the right side. Since claimant had already been through physical therapy, Dr. Goel elected to inject, under flouroscopy the joints in claimant's spine at two levels. Dr. Goel last saw claimant on January 10, 2005 and determined claimant had significantly improved although he still had a dull back ache. Dr. Goel released claimant at maximum medical improvement and opined claimant did not have a functional impairment.

After claimant was released from treatment by Dr. Goel, he returned to work for respondent and was assigned a job taking out a railroad line. He voluntarily left his employment with respondent on August 19, 2005. He never requested additional medical treatment as he continued working through August 19, 2005. He then went to work for another company as a millwright which he described as installing insulation, pulling things apart, cutting things with a torch and fixing things.

Claimant's back continued to be symptomatic and when he sought additional medical treatment at the preliminary hearing on December 15, 2005, he testified that his pain was limited to his back on the right at the belt line with no leg pain. And that he had not suffered additional injury after he left work with respondent as his subsequent employers did not require him to perform as rigorous physical work. After the preliminary hearing the ALJ ordered Dr. David Hufford to perform an independent medical examination

of claimant to determine if claimant was at maximum medical improvement or if further medical treatment was necessary. After examining claimant, Dr. Hufford opined claimant needed additional treatment.

Dr. Hufford then provided claimant treatment which initially consisted of instructing claimant on home exercises as claimant was working out of state. On September 1, 2006, the doctor injected claimant's left ischial bursa with a Depo-medrol and lidocaine/marcaine mix. The doctor also ordered an MRI of claimant's back. The MRI revealed an L5-S1 herniated disk with a slight protrusion to the right. On December 26, 2006, Dr. Hufford concluded claimant was at maximum medical improvement but that he might require periodic treatment consisting of a series of lumbar epidurals if claimant's symptoms increased in the future. Dr. Hufford opined claimant suffered a 5 percent permanent partial whole person impairment for her low back based upon the *AMA Guides*¹, DRE Lumbosacral Category II. Claimant was released with no permanent restrictions.

Dr. C. Reiff Brown, a board certified orthopedic surgeon, examined claimant on April 9, 2007, at the request of his attorney. He took a history from claimant and reviewed past medical records. He performed a physical examination and diagnosed claimant with a herniation at L5-S1 with nerve impingement at the S1 level. Dr. Brown's examination revealed claimant's right calf to measure one centimeter less than the left calf. Dr. Brown opined this confirmed the S1 nerve compression. Dr. Brown opined claimant suffered a 10 percent permanent partial whole person impairment for his low back based upon the *AMA Guides*, DRE Lumbosacral Category III. And an additional 1 percent whole person impairment for the atrophy of claimant's right calf. He did not impose work restrictions at the request of claimant.

The sole issue is the extent of claimant's functional impairment. Functional impairment is the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the *AMA Guides to the Evaluation of Permanent Impairment*, if the impairment is contained therein.² The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.³ It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony with the testimony of the claimant and others in making a determination on the

¹ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

² K.S.A. 44-510e(a).

³ *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

issue of disability. The trier of fact must make the ultimate decision as to the nature and extent of injury and is not bound by the medical evidence presented.⁴

Although Dr. Goel initially treated claimant, such treatment only lasted for approximately one month and afterwards claimant received additional medical treatment as well as additional diagnostic testing which indicated a worsening of claimant's back condition. And Dr. Goel's rating was based upon the last time he saw claimant on January 10, 2005. Consequently, the Board concludes that Dr. Goel's opinion regarding claimant's functional impairment is not persuasive.

Dr. Hufford concluded that claimant's condition warranted placement in the AMA *Guides*, DRE Lumbosacral Category II for a 5 percent whole person functional impairment. Conversely, Dr. Brown concluded that claimant's condition warranted placement in the AMA *Guides*, DRE Lumbosacral Category III for a 10 percent whole person functional impairment. And Dr. Brown added 1 percent for the atrophy in claimant's calf which resulted in an 11 percent whole person functional impairment.

Although Dr. Hufford agreed that radiculopathy signs are necessary to place an injured person in Category III, he thought such radiculopathy needed to be confirmed by a nerve conduction study. And that measurement of the calf and thigh to document atrophy was necessary. Neither procedure was performed or requested by Dr. Hufford. But Dr. Hufford further stated that other signs necessary to place claimant in Category III such as muscle guarding and trigger points were not present on his examination of claimant. Conversely, Dr. Brown opined claimant had significant signs of radiculopathy as confirmed by the measured atrophy in claimant's calf which warranted placement in Category III. But he noted that the AMA *Guides* provided as an example the loss of relevant reflex or measured unilateral atrophy greater than 2 centimeters above or below the knee. And his measured loss was 1 centimeter in claimant's calf. After considering both doctors' opinions, the Board finds both are credible and, therefore an average of the ratings provided by Drs. Hufford and Brown is the most reasonable approach. Thus, the Award is modified to reflect an 8 percent whole person permanent partial functional impairment.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge John D. Clark dated December 11, 2007, is modified to reflect claimant suffered an 8 percent whole person permanent partial functional impairment.

The claimant is entitled to 9.57 weeks of temporary total disability compensation at the rate of \$307.78 per week or \$2,945.45 followed by 33.20 weeks of permanent partial

⁴ *Graff v. Trans World Airlines*, 267 Kan. 854, 983 P.2d 258 (1999).

disability compensation at the rate of \$307.78 per week or \$10,218.30 for a 8% functional disability, making a total award of \$13,163.75, which is ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of April 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Charles W. Hess, Attorney for Claimant
Michael D. Streit, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge